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IN THE

Supreme Court of the United States

ZEINAB ALI,

Petitioner,

—v.—

ALAMO RENT-A-CAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AGUDATH ISRAEL OF AMERICA AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONER

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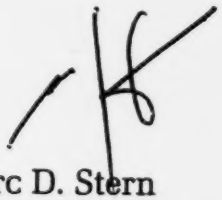
Proposed *amici*, American Jewish Congress, American Jewish Committee, Anti-Defamation League and Agudath Israel of America move this Court for an Order permitting the filing of the attached brief *amici curiae*.

Petitioner's counsel consented to the filing of this brief; Respondent's counsel did not respond to our inquiry.

Each *Amici* is an organization with a long record of involvement with religious accommodation under Title VII of the 1964 Civil Rights Act, representing individual clients, participating in litigation as *amicus*,

and in urging legislation designed to improve the effectiveness of the Act. They each believe that their collective experience may aid the Court in deciding this case.

Accordingly, the proposed *amici* respectively move for leave to file the attached brief.



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INTEREST OF THE *AMICI*

The American Jewish Congress is an organization of American Jews dedicated to protecting the civil and religious rights of American Jews and all Americans. It has filed briefs *amici curiae* in cases involving the religious accommodation of employees.

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The American Jewish Committee ("AJC"), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure.

AJC's interest in this case stems from its belief that without a fair and generous reading of the protection against religious discrimination accorded under the Civil Rights Act of 1964, as amended, conscientiously observant employees may be forced to violate major tenets of their faith is order to secure or retain gainful employment.

***

The Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

ADL has consistently adhered to the principle that its goal of combating religious prejudice, as well as

the general stability of our democracy, are best served through the strict separation of church and state and the use of the Free Exercise Clause to guard zealously the rights of all to their fundamental religious beliefs and the exercise of those beliefs. ADL's mission has guided it to file *amicus* briefs in virtually every major church-state case to reach this Court.

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Agudath Israel of America is a national Orthodox Jewish organization that advocates the rights and interests of observant Jews throughout the United States. Many of Agudath Israel's constituents are readily identifiable as Orthodox Jews through their distinctive religious garb and thus have a great personal stake in meaningful civil rights protection for religiously observant employees who are treated differently simply because they are dressed differently.

ARGUMENT[1]

Introduction

The Civil Rights Act of 1964 banished 'separate but equal' treatment of racial and religious minorities from the workplace. Nevertheless, the Fourth Circuit resurrected that discredited doctrine, reading it into the very statute designed to eradicate it. This Court should grant the Petition for Certiorari to decide whether the Court below thereby distorted beyond recognition this great statutory charter of equality.

The holding of the Court below boils down to the proposition that employees whose religious beliefs require the wearing of distinctive garb may be banished to the workplace equivalent of the back of the bus so long as the employee suffers no measurable economic loss. Moslem women who cover their hair with scarves, Orthodox Jewish males who cover their heads with skull caps, Sikhs who wear turbans, Pentecostalist women who refuse to wear pants, and men of various faiths who do not shave for religious reasons, may be relegated with impunity to workplace ghettoes, so long as the employer does not impose any economic penalty, or what the Court below termed an "adverse employment action".

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1. No person or corporation other than the *amici* or their counsel participated in the drafting of this brief, nor did any person or corporation other than the *amici* contribute towards its cost.

Because the statute treats racial and religious discrimination[2] equally, employers in the Fourth Circuit may now relegate blacks to back offices, away from contact with customers, give them all the undesirable tasks and assignments in the workplace, and insist on separate but equal waters coolers and bathrooms.

To state the proposition that such palpably discriminatory and prejudiced treatment of employees does not offend an Act guaranteeing equal employment opportunity and banishing bias and bigotry from the workplace, is to refute it. If authority is needed, it is readily available. A leading treatise on employment discrimination law summarizes the law as follows:

> Segregated facilities played a prominent role in the history of racial discrimination. Such bastions of racial discrimination were among the first to be attacked and conquered.
>
> Segregation of physical facilities, such as lockers, water fountains, recreation areas, restrooms and other facilities at the place of employment, on the basis of race violates Title VII. If housing is provided by the employer, it constitutes a term and condition of employment and cannot be segregated. Segregated parties and social

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2. Religious practice is within the scope of the ban on religious segregation contained in 42 U.S.C. § 2000e-2(a) by virtue of the definitional provisions of the statute, 42 U.S.C. § 2000e(j).

clubs violate Title VII if sponsored by the employer.

B.L. Schlei & P. Grossman, Employment Discrimination Law (2nd Edition, Chapter 9, § V, pp. 300-301) (1976).

These propositions are there, *id.* at nn. 33-36, and in later supplements, supported by a lengthy list of authorities, including both judicial decisions and decisions of the Equal Employment Opportunity Commission. In those decisions, dealing with non-economic attributes of employment such as locker rooms, bathrooms and water coolers, the Commission and the courts uniformly concluded that separate but equal facilities were illegal without regard to whether those segregative practices imposed what the Fourth Circuit, 2001 W.L. 218788, *1 (4th Cir. 2001), called an "adverse employment action," *i.e.*, an economic cost, such as a present or likely future loss of wages or benefits. The wrong identified in these early cases is segregation, not segregation leading to economic loss.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OF THE CIRCUITS WHETHER ONLY ECONOMICALLY VALUABLE "TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT" ARE PROTECTED BY TITLE VII

The Fourth Circuit drew its "adverse employment action" requirement from the language of 42 U.S.C. § 2000e-2(a)(1). That subsection bans discrimination with respect to "compensation, terms, conditions or privileges

of employment" on grounds, *inter alia*, of race or religion.

The Fourth Circuit's economic-based reading of the phrase "terms, conditions or privileges" of employment is not unique. Accord, *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850 (8th Cir. 2000). It is, however, not self evidently correct. Whether the "terms, conditions or privileges" are limited to economic "terms, conditions or privileges" is itself an important question meriting the Court's review both because of its intrinsic importance and because not all courts accept the narrow reading of the Fourth and Eighth Circuits. See *Sharp v. Houston*, 164 F.3d 923 (5th Cir. 1999) (transfer to less prestigious or interesting position actionable); *Jeffries v. State*, 147 F.3d 1220, 1232 (10th Cir. 1998); *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir. 1996) (loss of prestige); *McCabe v. Sharrett*, 12 F.3d 1558, 1564 (11th Cir. 1990) (menial responsibilities).

Amici believe the latter interpretation to be correct. Although people work largely for economic reasons, economic concerns do not encompass all of the factors that lead people to take one job over another. Economic reasons are not even necessarily foremost in people's minds–closeness to home, hours of employment, physical environment, risk of harm, type of work, ability to exploit one's talents, success on the job and contact with people, all are important

considerations for many workers, perhaps even more important than an increased salary.

Experts in human resources take note of these non-economic factors, which sometimes are sufficiently important that they either out-rank salary in importance or induce employees to accept less pay in order to exploit some non-economic job benefit.[3]

These are all factors arguably subsumed under the phrase "terms, conditions or (especially) privileges" of employment. Yet those courts which, like the Fourth and Eighth Circuits, insist on an economic detriment, allow these benefits be denied employees for reasons of racial, religious and gender bias. Some changes in working conditions may be too unimportant to effect the "terms, conditions, or privileges" of employment. *Cf. Carson County v. Breedon*, 121 S.Ct. 1508 (2001). However, it is an open question whether the Fourth Circuit correctly held that no non-economic interest could give rise to a Title VII claim.

II. SEGREGATING EMPLOYEES IS ILLEGAL WITHOUT REGARD TO ECONOMIC LOSS

The correctness of the Fourth Circuit's adverse employment action test is not the only important

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3. See, e.g., Y. Ting, Analysis of the Federal White-Collar Work Force: Findings From the Survey of Federal Employees, 26 *Rev. Public Admin.* 439 (1994); C. Caggiano, What Do Workers Want?, 14 *Inc.*, p. 101 (1992).

question presented by this Petition. The limiting phrase "compensation, terms, conditions or privileges of employment," the statutory basis of the Fourth Circuit's "adverse employment action" requirement, does not appear in Section 2000e-(a)(2), which flatly forbids an employer to "segregate ... his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee ... because of such individual's religion." (Emphasis added.) That prohibition, which accurately describes Alamo's action in confining Ms. Ali to its back office operation, is not limited by the phrase "compensation, terms, conditions or privileges of employment." Hence it should apply even where there is no "adverse employment action."

Congress banned workplace segregation if it merely tended to adversely affect an individual employee. Thus, the explicit language of the text precludes a threshold requirement of actual economic harm, or an "adverse employment action," for Congress deliberately banned practices which only tended to adversely affect an individual employee. Creating a caste of employees who, like the proverbial crazy uncle, are kept out-of-sight, on grounds of race, religious garb or gender inevitably "tends" to adversely affect the advancement of the segregated employees. Moreover, segregation telegraphs to them, fellow employees and third parties that they are not employees the employer fully respects, values or trusts to do his business. Those

harmful tendencies are magnified where, as here, contact with the public is the essence of the employer's business.

Title VII's enactment was the culmination of a decade-long national struggle to implement this Court's landmark holding in *Brown v. Board of Education*, 344 U.S. 1 (1954), that separate was no longer unequal. Congress knew what it was doing in 1964 when it banned employers from perpetuating the isolation of separate but equal in the workplace without regard to economic loss.

Congress protected two distinct interests in Section 2000e-2, and established differing thresholds of harm appropriate to each. 42 U.S.C. § 2000e-2 (a)(1) arguably (although *amici* do not agree, Point I, *supra*) protects against economic losses attributable to employment discrimination. This section is limited to "terms, conditions or privileges" of employment. In contrast, 42 U.S.C. § 2000e-2 (a)(2), pointedly omits any economically-based language. It broadly protects against the harm to dignity interests inherent in workplace segregation.

Proof of a violation of Section 2000e-2(a)(1) might arguably be thought to require some proof of a tangible economic harm. Not so with regard to Section 2000e-2(a)(2)'s ban on segregated workplaces, protecting employees against affronts to their dignity. To protect that interest, which is not reducible to a dollars and

cents measurement, an economic threshold is wholly inappropriate.

If, as the Court below held, both branches of the statute require a showing of an "adverse employment action" measured only in economic terms, the two provisions are completely redundant. Everything prohibited by Section 2000e-2(a)(2) is already proscribed by Section 2000e-2(a)(1). Any segregative act with 'adverse employment consequences' would by definition affect the "terms, conditions or privileges of employment."

III. THE COURT NEED NOT ADDRESS POSSIBLE DEFENSES IN THIS PROCEEDING

The Court below rested its decision exclusively on the absence of an "adverse employment action." It had no occasion to consider whether the appropriate defense to Ali's charge of deliberate "segregation" is that of undue hardship, the usual defense to a failure to accommodate a religious practice, 42 U.S.C. § 2000e-2(j), or whether the more stringent BFOQ, 42 U.S.C. § 2000e-2(e) or business necessity test, 42 U.S.C. § 2000e-2(k), applies.

It may not matter. Presumably, a reasonable accommodation is a legal accommodation. A proffered accommodation which deliberately segregates workers on the basis of religion in violation of Section 2000e-2(a)(2) is illegal, and therefore not reasonable. *Cf. TWA v. Hardison*, 432 U.S. 63, 79 (1977) (contract forbidding

accommodation illegal). Moreover, because the evident undue hardship is that of a supposed customer preference for secularly dressed employees, the defense may fail in any event. Biased customer preference–even if it is more than Alamo projecting its own prejudices onto its customers–is not a sufficient defense to a charge of employment discrimination. *Diaz v. Pan American Airways*, 442 F.2d 385 (5th Cir. 1991). Resolution of these issues must await further proceedings.

CONCLUSION

The judgment of the Court below rests on an evident and pernicious misconstruction of the statute. This Court should grant the prayed for writ, and reverse the judgment.

Respectfully Submitted,

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